VIRGINIA LAW REGISTER

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Bills of Exception—"Where Are We At?"

The creation of a legislative bureau does not seem to have much effect, as far as legislation is concerned, in keeping the legislature straight. We find on page 708, of the Acts of 1916, the following Act:

"2. That the bill of exception as heretofore employed in any judicial proceeding as means of preserving an exception to any action, ruling, order or judgment of any trial court by any party be, and the same is hereby abolished, and that in lieu of such bill of exception it shall be sufficient that, by a note thereto appended or thereon endorsed, in case of the denial by the trial court of any instruction to the jury, the trial judge shall certify that such instruction was requested by any party and denied by the court, and that the party requesting the same excepted; in case of any instruction granted by the court, that any party excepted thereto; in case of any question propounded to a witness, that said question was allowed or disallowed, according to the fact, and that any party excepted; and shall further certify briefly, where such question is disallowed, the answer which such question would have elicited, if at the time that objection was made to the question by a party excepting thereto, the tenor of the answer was ascertained by the court, the name of the witness to whom the question was propounded, the party by whom such witness was introduced, and at what stage of the examination, whether upon direct, cross, redirect examination, et cetera, as the case may be, the question was propounded; in case of the granting or over-ruling of a motion for a new trial, that any party excepted; in case of an exception by any party to any other action, ruling, order or judgment, of any trial court, or of any other matter arising in the course of the trial or hearing of a cause, it shall be sufficient, instead of a bill of exception as heretofore obtaining, that the trial judge shall certify that any party excepted to such action, ruling, order, judgment or matter.

"3. That it shall be sufficient for all the purposes of a review

by any appellate court of any action, ruling, order, judgment, or matter, arising in the course of the trial or hearing of a cause, that the trial judge shall certify the evidence introduced at the trial or hearing of such cause when a consideration of the evidence may be necessary, in order to a decision upon an appeal of any question involved in such review; but nothing in this act contained shall be construed to preclude the trial judge from certifying, in lieu of the evidence, the facts proved on the trial or hearing of the cause, as now provided by law.

"4. That the forms of the respective certificates hereinabove provided for shall be substantially as follows:

'The foregoing instruction was granted at the request of the plaintiff (or defendant) and the defendant (or plaintiff) excepted. Teste: by consent (if such be the fact) this..... day of.....19....,..... Judge.'

The foregoing instruction requested by the plaintiff (or defendant) was denied, and the plaintiff (or defendant) excepted. Teste: by consent (if such be the fact) this..... day of.....19....,.....Judge.'

'To the foregoing question propounded to....., witness for the plaintiff (or defendant) upon direct, cross, re-direct examination, et cetera, by the plaintiff (or defendant), and notwithstanding the defendant's (or plaintiff's) objection, allowed by the court, the defendant (or plaintiff) excepted. Teste: by consent (if such be the fact) this..... day of.....19....,..... Judge.'

'The foregoing question propounded to....., witness for the plaintiff (or defendant), upon direct, cross, re-direct examination, et cetera, by the plaintiff (or defendant), upon objection by the defendant (or plaintiff), was disallowed by the court, and the plaintiff (or defendant) excepted; the answer to the question excepted by the plaintiff (or defendant) was.....Teste: by consent (if such be the fact) this.....day of..... 19....,.....Judge.'

'The following evidence on behalf of the plaintiff and of the defendant, respectively, as hereinafter denoted, is all the evidence that was introduced on the trial of this cause (here insert evidence). Teste: by consent (if such be the fact) this.....day of.....19....,....., Judge.'

'The following instructions granted at the request of the plaintiff and of the defendant, respectively, as hereinafter

denoted, are all the instructions that were granted on the trial of this case (here insert instructions). Teste: by consent (if such be the fact) this.....day of..... 19....,.....Judge.'

"5. That in all cases, to preserve of record to all the intents and purposes any exception to any action, ruling, order of judgment of the trial court, or any matter arising in the course of the trial or hearing of a cause; it shall be sufficient that the trial judge, on the application of any party, shall certify the same simply and substantially in accordance with the provisions of this act.

"That the appellate court in reviewing upon a writ of error, or supersedeas, to a final judgment, or upon an appeal from a final decree, of an inferior court in a cause any question arising upon the record in such cause shall in every instance, wherever necessary to a decision of such question, consider any exception, the evidence introduced on the trial or hearing of the cause, or any other matter, preserved of record in such cause by the certificate of the trial judge as provided by this act; nor in the determination of any such question shall it be necessary to enable the appellate court to consider any other exception, or the evidence introduced at the trial or hearing of the cause, or any other matter preserved of record in the cause, by the certificate of the trial judge as provided by this act, that there shall be any express reference in the certificate of the exception under which such question may arise to the certificate of any other exception, of the evidence introduced at the trial or hearing, or of any other matter, preserved of record in the cause, as herein provided; no certificate by the trial judge under the provisions of this act shall embody the name of the court or style of the cause, or be otherwise than as herein substantially provided; nor shall the clerk of any trial court in making up a transcript of the record in the cause for any party for the purpose of praying a writ of error, supersedeas or an appeal, after having once identified the cause by its proper style in the trial court, in the caption of such transcript, thereafter in such transcript, reproduce or repeat the style of such cause appears as a part of the matter preserved by a certificate of the trial judge, made under the provision of this act.

"7. That any certificate to the intents and purposes of this act may be signed by the trial judge either during the term of the court at which a final judgment in the cause is rendered, or within thirty days after the end of such term, either in term time or in vacation, whether another term of such

court shall have intervened or not, or within such period in excess of the period of thirty days after the end of such term, as the parties by consent entered of record at any time either in term time or vacation may agree upon; or if any bill of exception now required under any statute or rule of law or which may hereafter be required by certificate under this act shall have been presented to the court or judge in vacation for the signature of the judge, within said thirty days, or such time as has been agreed upon, and said judge has not signed said certificate or bill of exception on account of same not fairly stating the evidence or the case, or for any other cause, said judge to whom such bill of exception or certificate has been presented, shall summons the attorney for the parties before him at such time and place as he shall see cause, within a reasonable time after having been so requested by the attorneys of the party filing the exception or certificate, and amend such bill of exception or certificate in such manner as shall in his opinion fairly state the case, and then sign said amended bill of exception or certificate, and when so signed shall have the same effect as if it had been signed within said thirty days or the time agreed; and this provision shall apply to all cases now pending in any court of this Commonwealth and all cases where bills of exception have been filed with any judge in time but not signed for any cause, provided the right of appeal has not been barred by the one year limitation, from the date of the final entry of the final order; and whenever any cause is heard in vacation any certificate to the intents and purposes of this act may be signed by the trial judge within thirty days after the entry in vacation of such final judgment, or within such period in excess of the period of thirty days after the entry of such judgment, as the parties, by consent entered of record, may agree upon.

"It shall be sufficient evidence that the certificate of the trial judge made under the provisions of this act was signed by him by such consent of the parties (if such be the fact), on any day specified, that such judge shall substantially in accordance with the forms of certificate prescribed by this act, so indicate by the insertion of the words 'by consent' simply in such certificate.

"8. That all statutes or parts of statutes in derogation of, or in conflict witn, the provisions of this act be, and the same are hereby repealed.

"But nothing in this act contained shall be construed to alter or affect the practice or procedure now obtaining by law with respect to appeals in suits in chancery, except with re-

spect to such proceedings where such occur, in any suit in chancery, as are according to law, conformed with the practice and procedure at common law."

And on page 722, the following Act:

"Sec. 3385. Bill of exceptions.—In the trial of a case at law, in which an appeal, writ of error or supersedeas lies to a higher court, a party may except to any opinion of the court, and tender a bill of exceptions, which, if the truth of the case be fairly stated therein, the judge shall sign, and it shall be a part of the record of the case. And bills of exceptions may be tendered to judge and signed by him, either during the term at which the opinion of the court is announced, to which exception is taken, or within thirty days after the end of such term, either in term time or vacation, whether another term of the court has intervened or not, or at such other time as the parties, by consent of record (which consent may be entered either during the term at which the opinion or judgment excepted to is rendered, or during any subsequent term or vacation), may agree upon, and any bills of exceptions so tendered to and signed by the judge, as aforesaid, either in term time or in vacation, shall be a part of the record of the case, and in every such case when the order of the court fails to show that the time agreed upon by the parties within which such bill of exceptions may be filed was by consent of parties, if such be the fact, the certificate of the court in the bill of exceptions shall be sufficient, or the court after signing the same may certify that fact to the supreme court of appeals. The same rule shall apply when cases are heard or opinions are rendered in vacation, in which case the party excepting shall have thirty days from the day that such opinion is rendered. This act shall apply to criminal cases as well as to civil cases.

"2. Any and all bills of exceptions in any criminal case, in which final judgment has not been rendered by the appellate court at the time that this act goes into effect, which may have been signed by the judge within the time and in the manner herein prescribed, shall be deemed and treated as a part of the record of such case, but this act shall not apply to any civil case now pending in the supreme court of appeals.

"3. In order that this act may be given effect as soon as practicable, an emergency is declared to exist, and this act shall be in force from its passage."

The last Act is declared to be an emergency Act, and, therefore, took effect before the Act of March 21st, but both Acts are now the law, and which is which? What is a poor lawyer to do in view of these two enactments, directly contrary? The first Act it will be seen is one in which the legislative body has attempted to make the question as to preparation of bills of exception no longer one to which there cannot be a ready answer. It seems to us that this Act is a most excellent one, and whilst we have no doubt that when put to the test of practice amendments may be necessary, yet as far as we can see at the present there is very little to be done by the practicing lawyer except to follow this Act to the letter. We therefore have only unqualified praise to give to it; our difficulty, however, arises from the Act on page 722, which seems to leave the bills of exception very much in the same shape, with some slight changes, as they were before the Act of March 21st. Which Act is the law? We are afraid the courts may ultimately have to determine, and yet one of our associate editors has suggested that the passage of the second Act, which was merely an emergency Act, was to fill the gap between that time and the time the Act on page 708 went into effect. In other words, that the intent of the Act on page 722 was that the law under that Act—which is an emergency Act—should remain the law until the complete law on page 708 went into effect, which was, we believe, on the 17th of June. And yet this way out of the difficulty, which is certainly ingenious, does not satisfy us. Both Acts were passed upon the same day, approved on the same day. The one amends § 3385 of the Code as heretofore amended; the other makes no reference whatever to the Code or any preceding Act. The Act on page 708 repeals all statutes, or parts of statutes, in derogation of or in conflict with the provisions of its terms. Could this repeal an Act passed and approved on the same day? We can offer no solution to the difficulty which confronts us and we do not believe that it is possible to reconcile these two Acts so as to make it safe to proceed under either until there has been a definite decision by the court of last resort as to which one is the law.

Minority Stockholders.

The minority stockholder has very little chance to do anything, but "kick" when he is dissatisfied with the management of a corporation. His rights are as they must needs be, subordinated to the general good, "even," as Mr. O'Leary once remarked "if it is bad."

The Supreme Court of Alabama in *Phinizy* v. *Anniston Land Co.*, 71 So. 469 has decided that a solvent corporation will not be dissolved by a court of equity at the instance of minority stockholders merely because it is alleged that he himself is a failure and that to further carry it on will end in inevitable ruin.

"On the contrary, so long as the corporation is a going concern; so long as it possesses the means and ability to pursue one or more of its primary purposes or lines of business; and so long as the conditions exhibited do not demonstrate to a moral certainty that its continuation must by inevitable necessity result in serious loss in the near future, and in complete ruin sooner or later—a court of equity will not and should not deprive the majority stockholders of their right to carry on their business under their chosen management, however speculative and uncertain its prospects may seem to a disapproving and dissentient minority."

Nor will a receiver be appointed at the instance of a stockholder merely because he is excluded from the management of a corporation. This is decided in *Murray* v. *Keeley Institute*, 157 N. W. 87. This is, however, but announcing what it would seem to most lawyers is an old and well settled principle.

Prima Facie Authority of the President of a Corporation as to the Execution of a Note of the Corporation.

Upon no question are the courts more divided than that as to whether a note of a company executed by the president is *prima facie* evidence of his authority to give the same. In the case of Moyse Real Estate Co. *v.* First Nat. Bank of Commerce, 70 So. 821, the court holds that such a note is *prima facie* evidence of the president's power to execute it, saying, "Nearly all the big business and a large part of the small business is now conducted by corporations, and if it be the law that persons dealing

with the president of a corporation about matters of business clearly within the powers of the corporation to transact must deal at arm's length, and demand that the president exhibit his credentials before entering into contracts with him, it seems to us that not only the corporation, but also those dealing with corporations, will be seriously hampered. It is not our purpose to hold that a president of a corporation has the inherent power to bind the corporation, but we do hold that the fact that the president of a corporation has executed a contract for his corporation, is prima facie evidence that the president had the authority to bind the corporation."

The New York courts take just the opposite view, holding in accordance with the weight of authority that the power to execute such a note must be conferred by specific resolutions of the directors or by the by-laws. One cannot recover on a corporate note executed by its president and not under its corporate seal without showing the power of the president to execute and deliver it. Weschester Mortgage Co. *v.* Thos. B. McIntire, 157 N. Y. Supp. 725.

It does seem to us, however, that the reasoning in Moyse, etc. *v.* First Nat. Bank, *supra* is logical and ought to be the law. The question is not whether such a note is absolutely binding upon the corporation, but that the *onus* of proving the authority to execute ought not to be thrown upon the party holding the note, unless the question of fraud or lack of good faith is in some way involved.

Very often the by-laws of a corporation give the president authority to execute notes. Very often it is essential that he should have such power. Such power is therefore frequently lawfully exercised and ought certainly to be presumed. It is much easier for the corporation to prove lack of authority than it is for the holder to prove authority and whilst we are aware that the burden of authority is against us, we believe that the doctrine of Moyse *v.* First Nat. Bank ought to be the law. Our own court of appeals has been held in West Salem Land Co. *v.* Montgomery Land Co., 89 Va. 192, that ratification of an unauthorized act of a corporate officer may be presumed from a failure to exercise promptly the right of disaffirmance. Such ratification may be presumed from the acts of recognition beyond

the time during which disaffirmance should have been made and where the corporation receives the money for which a note is given—of course—such an act is a ratification. First Nat. Bank, etc. *v.* Kimberland, 16 W. Va. 555.

New York Takes the Back Track.

In the case of *Eichner* v. *Bowery Bank,* 24 App. Div. 63 the New York court held that a corporation was not liable for slander. In two recent cases—*Kharas* v. *Collier Inc.,* 171 N. Y. App. Div. 388 and *Roemer* v. *Jacob Schmidt Brewing Co.,* 157 N. W. p. 640 the contrary is now held, the first of these cases overruling the earlier case of *Eichner* v. *Bowery Bank, etc.* The weight of authority has always been the other way and we are glad to see New York at last taking the proper view of the case.

The Massachusetts Income Tax.

The ancient and venerable Commonwealth of Massachusetts has awakened to the necessity of an income tax, and like a strong man awakened from slumber, has put forth the tax in all its strength.

The law was approved by the Governor on May 26, 1916, and took effect upon its passage, but the first tax levied will be in the year 1917. Every individual inhabitant of the Commonwealth, including every partnership, association or trust, whose annual income from all sources exceeds two thousand dollars is required to make a return on or before the first day of March in each year, with reference to income received during the calendar year ending on the preceding thirty-first day of December. The rate of tax is *six per cent.* upon interest from bonds, notes, etc., and from certain dividends of corporations, partnerships, association or trusts. Income from annuities, and the excess of two thousand dollars derived from professions, employments, trade or business are taxed at one and one-half per cent. The excess of gains over losses received from purchases or sales of intangible personal property is taxed at the rate of three per cent. Various exceptions, exemptions and deductions are provided for. The penalties in-

clude an additional tax of five dollars for every day of default in making return and a fine of not less than one hundred dollars nor more than ten thousand dollars, or imprisonment for not more than one year, or both, such fine and imprisonment for filing a fraudulent return or for filing an incorrect or insufficient return after notice of delinquency and failure to file return without reasonable excuse within twenty days after receiving such notice. Information, instead of deduction, at the source is a feature of the act.

Mr. Justice McReynolds Dissenting.

There is an old story about an ancient darkey widow whose mourning was so intensely black as to every garment that it aroused inquiries. "Go-way from here, nigger," she replied to one of her questioners, "when I mones-I mones."

And so we may say when Mr. Justice McReynolds dissents, he dissents. In the case of Northern P. R. Co. *v.* Wall, U. S. Sup. Ct. Advance Opinion No. 13, p. 493, the learned justice says: "For two reasons I am unable to agree with the opinion of the court.

First. If reiteration can establish a rule of law, it must be taken as settled that in causes coming here by writs of error from state courts of last resort we may not consider Federal questions not specially set up below. And further, that such a question comes too late if raised for the first time after final decision in the highest state court by petition for rehearing unless this was actually entertained. St. Louis & S. F. R. Co. *v.* Shepherd, 240 U. S. 240, 241, ante, 274, 36 Sup. Ct. Rep. 274; McCorquodale *v.* Texas, 211 U. S. 432, 437, 53 L. Ed. 269, 270, 29 Sup. Ct. Rep. 146. * * *

Second. The bill of lading itself is an elaborate document, bearing on its face evidences of care and deliberation in the formation of the conditions of the liability of the companies issuing it. The language is chosen by the companies for the purpose, among others, of limiting and diminishing their common-law liabilities, and if there be any doubt arising from the language used as to its proper meaning or construction, the words should be construed most strongly against the companies, because their of-

ficers or agents prepared the instrument, and as the court is to interpret such language, it is, as stated by Mr. Justice Harlan, in delivering the opinion of the court in First Nat. Bank *v.* Hartford F. Ins. Co., 95 U. S. 673, 24 L. Ed. 563, 565: 'Both reasonable and just that its own words should be construed most strongly against itself.' Texas & P. R. Co. *v.* Reiss, 183 U. S. 621, 626, 46 L. Ed. 358, 360, 22 Sup. Ct. Rep. 252." And there can be no question that the record bears out the learned Justice's opinion, though the court ignores this in the opinion.

But in concluding the dissenting opinion in which Mr. Justice McKenna concurs, Mr. Justice Reynolds says, referring to the bill of lading which was the contract sued upon, "Manifestly its language has given rise to a very grave doubt; therefore, I think the contract should be construed most strongly against the company and with a view to preserve shippers' rights. The construction placed upon paragraph 6 *by the state supreme court, when sitting within surroundings designed to stimulate clear thinking, is diametrically opposed to the one now adopted.* In such circumstances it appears to me hardly reasonable to say that a stockman at a wayside Montana station was bound instantly to apprehend the true interpretation, notwithstanding any mental quickening which he may have received from a 'rough wind' and a modest thermometer pointing to only '7 or 8 degrees below zero.' "

We must confess that we admire exceedingly the language the learned Justice uses and we fain would wish that appellate courts would consider the sentence we have italicized. Whilst by captious critics it might be supposed that the Supreme Court of the United States sat "within surroundings designed to stimulated clear thinking"—and it would be a source of ineffable regret if it did not—yet we see plainly what the Justice meant. The court nearest to the case—especially the State Appellate Court is very often in a better situation to take in all the surrounding circumstances and see more clearly the very right of the matter, than the tribunal sitting a long way off. The same may often be said of a nisi prius court, and we believe many of our appellate courts take this into consideration especially in jury trials. It ought to be considered, anyway, by all the Appellate Tribunals and we are indebted to Mr. Justice McReynolds for the well put idea.